American Bar Association
www.supremecourtpreview.org

No. 08-267

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB DENEDO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

DANIEL J. DELL'ORTO
Principal Deputy General Counsel
Department of Defense
LOUIS J. PULEO
Col., USMC
Director
BRIAN K. KELLER
Deputy Director
TIMOTHY H. DELGADO
Lt., JAGC, USN
Appellate Government Division
Department of the Navy
Washington, D.C.

GREGORY G. GARRE
Solicitor General
Counsel of Record
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
PRATIK A. SHAH
Assistant to the Solicitor General
JOHN F. DE PUE
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether an Article I military appellate court has jurisdiction to entertain a petition for a writ of error coram nobis filed by a former service member to review a court-martial conviction that has become final under the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutes involved 2
Statement 2
Summary of argument 10
Argument:
The military appellate courts lack jurisdiction to adjudicate a former service member's coram nobis challenge to the merits of his final court-martial conviction 12
A. Coram nobis review of a final court-martial judgment is not "in aid of" the jurisdiction of a military appellate court 13
1. *Goldsmith* makes clear that the All Writs Act does not provide an independent basis of military-court jurisdiction to review court-martial judgments 13
2. Military courts lack jurisdiction under the UCMJ to hear coram nobis challenges to the merits of final court-martial judgments 16
a. The plain text of the UCMJ forecloses post-finality review in military courts 17
b. Longstanding military-law authorities and the UCMJ's legislative history confirm the unavailability of coram nobis review in military courts 22
c. This case is readily distinguishable from the limited circumstances in which the All Writs Act arguably may be invoked in aid of military-court jurisdiction 27

Table of Contents—Continued: Page

3. The military courts also lack jurisdiction over the petition for writ of error coram nobis because respondent is a former service member no longer subject to the UCMJ 29
B. Coram nobis review of the merits of a final court-martial judgment is neither necessary nor appropriate 32
1. Adequate alternative remedies are available to convicted former service members 33
2. Coram nobis jurisdiction is also inappropriate in light of the writ's traditional scope as well as the burdens imposed on the military justice system 36
Conclusion 40
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Abbott Labs. v. *Novopharm Ltd.*, 104 F.3d 1305 (Fed. Cir. 1997) 28
Axiom Res. Mgmt., Inc. v. *United States*, 80 Fed. Cl. 530 (2008) 28
Baker v. *Schlesinger*, 523 F.2d 1031 (6th Cir. 1975), cert. denied, 424 U.S. 972 (1976) 34
Booker v. *Arkansas*, 380 F.2d 240 (8th Cir. 1967) 36
Bowen v. *Massachusetts*, 487 U.S. 879 (1988) 16
Bowling v. *United States*, 713 F.2d 1558 (Fed. Cir. 1983) 35
Brown v. *GSA*, 425 U.S. 820 (1976) 19
Burns v. *Wilson*, 346 U.S. 137 (1953) 19

Cases—Continued: Page

Carlisle v. *United States*, 517 U.S. 416 (1996) 19, 32
Clinton v. *Goldsmith*, 526 U.S. 529 (1999) ..... *passim*
Commissioner v. *McCoy*, 484 U.S. 3 (1987) 16
Davis v. *Marsh*, 876 F.2d 1446 (9th Cir. 1989) 34
Del Prado v. *United States*, 48 C.M.R. 748 (C.M.A. 1974) 29
Delaware Div. of Health & Soc. Servs. v. *United States Dep't of HHS*, 665 F. Supp. 1104 (D. Del. 1987) 16
EC Term of Years Trust v. *United States*, 127 S. Ct. 1763 (2007) 19
Finkelstein v. *Spitzer*, 455 F.3d 131 (2d Cir. 2006), cert. denied, 549 U.S. 1169 (2007) 36
Goldsmith v. *Clinton*, 48 M.J. 84 (C.A.A.F. 1998) 15
Gusik v. *Schilder*, 340 U.S. 128 (1950) 20, 21, 34
Loving v. *United States*, 62 M.J. 235 (C.A.A.F. 2005) 3, 20, 26
Lowery v. *McCaughtry*, 954 F.2d 422 (7th Cir.), cert. denied, 506 U.S. 834 (1992) 36
Matias v. *United States*, 923 F.2d 821 (Fed. Cir. 1990) 35
Nicks v. *United States*, 955 F.2d 161 (2d Cir. 1992) 38
Noyd v. *Bond*, 395 U.S. 683 (1969) 27, 28
Peacock v. *Thomas*, 516 U.S. 349 (1996) 28
Pennsylvania Bureau of Corr. v. *United States Marshals Serv.*, 474 U.S. 34 (1985) 19
Riggs v. *Johnson County*, 73 U.S. (6 Wall.) 166 (1868) .. 28
Runkle v. *United States*, 122 U.S. 543 (1887) 37

Cases—Continued: Page

Schlesinger v. *Councilman*, 420 U.S. 738 (1975) 5, 7, 9, 20, 21, 34
Sindram, In re, 498 U.S. 177 (1991) 40
Solorio v. *United States*, 483 U.S. 435 (1987) 30
Syngenta Crop Prot., Inc. v. *Henson*, 537 U.S. 28 (2002) 13
Trenkler v. *United States*, 536 F.3d 85 (1st Cir. 2008), petition for cert. pending, No. 08-7947 (filed Dec. 22, 2008) 35
United Missouri Bank of Kan. City, N.A., In re, 901 F.2d 1449 (8th Cir. 1990) 16
United States v. *Davis*, 63 M.J. 171 (C.A.A.F. 2006) 31
United States v. *DuBay*, 37 C.M.R. 411 (C.M.A. 1967) 37, 39
United States v. *Frischholz*, 36 C.M.R. 306 (C.M.A. 1996) 21
United States v. *Morgan*, 346 U.S. 502 (1954) 36
United States v. *Smith*, 331 U.S. 469 (1947) 32
United States v. *Woods*, 26 M.J. 372 (C.M.A. 1988) 31
United States ex rel. New v. *Rumsfeld*, 448 F.3d 403 (D.C. Cir. 2006), cert. denied, 127 S. Ct. 2096 (2007) 34
United States ex rel. Toth v. *Quarles*, 350 U.S. 11 (1955) 11, 30, 38
Weiss v. *United States*, 510 U.S. 163 (1994) 3
Witham v. *United States*, 355 F.3d 501 (6th Cir. 2004) 18, 37

Constitution, statutes and rules: Page

U.S. Const.:
Art. I: 10, 12, 13, 16, 20, 28
§ 8, Cl. 14 ..... 2, 30
Art. II:
§ 2 31
Art. III ..... *passim*
Act of June 4, 1920, ch. 227, Art. 50½, 41 Stat. 797-799 .. 23
Act of June 24, 1948, ch. 625, 62 Stat. 604 23
§ 226:
62 Stat. 635 (Art. of War 50, 10 U.S.C. 1521 (Supp. III 1949)) 23
62 Stat. 637 (Art. of War 50(h), 10 U.S.C. 1521(h) (Supp. III 1949)) 24
§ 230, 62 Stat. 639 (Art. of War 53, 10 U.S.C. 1525 (Supp. III 1949)) 24, 25
All Writs Act, 28 U.S.C. 1651(a) ..... *passim*
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
10 U.S.C. 802 (Art. 2) 9, 1a
10 U.S.C. 802(a)(1) 3, 1a
10 U.S.C. 802(a)(7) 31, 2a
10 U.S.C. 803 (Art. 3) 9, 5a
10 U.S.C. 803(b) 31, 5a
10 U.S.C. 803(c) 31, 5a
10 U.S.C. 816 3
10 U.S.C. 816-821 3
10 U.S.C. 822-824 3

Statutes—Continued: Page

10 U.S.C. 827 3
10 U.S.C. 860 3
10 U.S.C. 866 (Art. 66) 9, 10, 17, 27, 6a
10 U.S.C. 866(a) 4, 17, 6a
10 U.S.C. 866(b) 4, 17, 6a
10 U.S.C. 866(c) 4, 17, 7a
10 U.S.C. 867 (Art. 67) 9, 10, 17, 27, 8a
10 U.S.C. 867(a) 4, 17, 8a
10 U.S.C. 867(c) 4, 17, 9a
10 U.S.C. 867a 4
10 U.S.C. 870 3
10 U.S.C. 870(c)(2) 39
10 U.S.C. 871 (Art. 71) 26, 31, 10a
10 U.S.C. 871(c) (Art. 71(c)) 10, 18, 26, 11a
10 U.S.C. 871(c)(1) (Art. 71(c)(1)) 4, 18, 38, 11a
10 U.S.C. 873 (Art. 73) ..... *passim*
10 U.S.C. 874 (Art. 74) 5
10 U.S.C. 876 (Art. 76) ..... *passim*
10 U.S.C. 881 2
10 U.S.C. 921 2
10 U.S.C. 941 *et seq.* 4
28 U.S.C. 1259 4
28 U.S.C. 1331 34
28 U.S.C. 1361 34
28 U.S.C. 1491(a) 35
28 U.S.C. 2241 33

Rules: Page

Courts-Martial R.:
Rule 401(c) 3
Rule 504 3
Rule 1102(d) 3

Miscellaneous:

Courts Martial—Lieutenant Devlin, 6 Op. Att'y Gen. 369 (1854) 22
H.R. Rep. No. 1034, 80th Cong., 1st Sess. (1947) 24
Manual for Courts-Martial, United States-1998 6
Manual for Courts-Martial, United States Army-1949 24
Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 97th Cong., 2d Sess. (1982) 26
19 James Wm. Moore et al., *Moore's Federal Practice* (3d ed. 2008) 13, 33, 36
Relief of Fitz John Porter, 18 Op. Att'y Gen. 18 (1884) . . 22
S. Rep. No. 486, 81st Cong., 1st Sess. (1949) 25
2 *Sundry Legislation Affecting the Naval and Military Establishments: Hearings Before the House Comm. on Armed Services*, 80th Cong., 1st Sess. (1947) 24
2 William Tidd, *Practice of the Courts of King's Bench and Common Pleas* (4th Am. ed. 1856) 36
Uniform Code of Military Justice: Hearings Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. (1949) 25

Miscellaneous—Continued: Page

William Winthrop, *Military Law and Precedents* (2d ed. 1920) 3, 23, 30

16 Charles Alan Wright et al., *Federal Practice and Procedure* (2d ed. 1996) 13

In the Supreme Court of the United States

No. 08-267

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB DENEDO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-60a) is reported at 66 M.J. 114. The order of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 62a-63a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2008. A petition for reconsideration was denied on April 4, 2008 (Pet. App. 61a). On June 23, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 1, 2008. On July 21, 2008, the Chief Justice further extended the time to August 29, 2008, and the petition was filed on that date. The petition for a writ of certiorari

was granted on November 25, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1259(4).

STATUTES INVOLVED

Pertinent provisions are set out in an appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

This case concerns the statutory jurisdiction of the military courts—created by Congress pursuant to Article I of the Constitution—to adjudicate collateral challenges by former service members to court-martial convictions that have long since become final.

Following a guilty plea before a special court-martial, respondent was convicted of conspiracy to commit larceny, in violation of 10 U.S.C. 881, and 15 specifications of larceny, in violation of 10 U.S.C. 921. He was sentenced to three months of confinement, a bad-conduct discharge from the Navy, and reduction to the lowest enlisted pay grade. The convening authority approved the sentence as adjudged. The Navy-Marine Corps Court of Criminal Appeals (N-MCCA) affirmed the findings and sentence. Respondent did not seek further review, and he was discharged from the Navy. Seven years later, respondent petitioned the N-MCCA for a writ of error coram nobis, alleging that he had received ineffective assistance of counsel. Pet. App. 3a-5a. The N-MCCA denied the petition. By a 3-2 decision, the United States Court of Appeals for the Armed Forces (CAAF) affirmed in part, reversed in part, and remanded for an evidentiary hearing. *Id.* at 1a-60a.

1. The Constitution empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 14. Congress has exercised that authority in promulgating the

Uniform Code of Military Justice (UCMJ), which by its terms governs the conduct of, among others, "[m]embers of a regular component of the armed forces." 10 U.S.C. 802(a)(1).

As set forth in the UCMJ, Congress has established a military justice system consisting of three tiers of Article I tribunals. See *Weiss* v. *United States*, 510 U.S. 163, 166-169 (1994). The accused is provided military defense counsel under the UCMJ before each of those tribunals. See 10 U.S.C. 827, 870.

First, a court-martial is the body that tries persons charged with violations of the punitive articles of the UCMJ. See 10 U.S.C. 816-821. There are three kinds of courts-martial—general, special (used here), and summary—and the varying jurisdictions of those courts-martial to try certain crimes and to prescribe certain punishments are statutorily defined. *Ibid.* General and special courts-martial are composed of a military judge and, unless the accused chooses otherwise, no less than five or three service members, respectively. 10 U.S.C. 816. Unlike a federal district court, a court-martial is not a standing trial court but is convened (typically by a commanding officer) to hear a particular case. See 10 U.S.C. 822-824; Rules for Courts-Martial (R.C.M.) 401(c), 504; see also *Loving* v. *United States*, 62 M.J. 235, 254 (C.A.A.F. 2005) ("In the military system there are no standing [trial] courts."). Its jurisdiction terminates once the convening authority has acted on the case (*i.e.*, approving or modifying the court-martial's findings and sentence). See 10 U.S.C. 860; R.C.M. 1102(d); see also William Winthrop, *Military Law and Precedents* 49-50 (2d ed. 1920) ("As a purely executive agency designed for military uses, called into existence by a military order and by a similar order dissolved when its pur-

pose is accomplished, the court-martial, as compared with the civil tribunals, is transient in its duration.").

Second, the courts of criminal appeals, sitting in three-judge panels, have jurisdiction to review the judgment of a court-martial when the sentence, as approved by the convening authority, extends to death, a punitive discharge, or confinement for one year or more. See 10 U.S.C. 866(b). A court of criminal appeals may affirm the findings and sentence only to the extent they are correct in law and fact based on the record. 10 U.S.C. 866(c). "In considering the record, [a court of criminal appeals] may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." *Ibid.* Each of the armed forces possesses a court of criminal appeals. See 10 U.S.C. 866(a).

Third, the CAAF, composed of five civilian judges, has jurisdiction to review the record in all cases reviewed by the courts of criminal appeals. See 10 U.S.C. 867(a); 10 U.S.C. 941 *et seq.* The CAAF's review is limited to matters of law. 10 U.S.C. 867(c). Decisions of the CAAF are subject to this Court's review by writ of certiorari as provided in 28 U.S.C. 1259. See 10 U.S.C. 867a.

Under the "final judgment" rule of UCMJ Article 71(c)(1), 10 U.S.C. 871(c)(1), "[a] judgment as to legality of the proceedings is final" when direct review is completed by a court of criminal appeals and by the CAAF (if timely sought), and when the time for filing a petition for a writ of certiorari has expired. Final judgment marks the end-point of appellate review, and only then may the Executive fully execute the sentence and discharge a service member from the armed forces. *Ibid.*

At that point, under the distinct "finality" rule of UCMJ Article 76, 10 U.S.C. 876, the findings and sentence, as affirmed by the military appellate courts, and any discharge carried into execution, become "final and conclusive." All military orders publishing the proceedings of courts-martial, and all action taken pursuant to those proceedings, becomes "binding upon all departments, courts, agencies, and officers of the United States, subject only to" three specified exceptions: a petition for a new trial under UCMJ Article 73, 10 U.S.C. 873; action by the relevant service Secretary under UCMJ Article 74, 10 U.S.C. 874; and the President's authority.

Although the UCMJ defines the jurisdiction of the military courts, final judgments from the military justice system are subject to collateral review by Article III courts in a variety of contexts. See, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 750-753 (1975); Pet. App. 6a-7a.

2. Respondent, a native and citizen of Nigeria, came to the United States in 1984 and enlisted in the Navy in 1989. In 1998, military authorities charged him with conspiracy, larceny, and forgery based on his participation in a scheme to defraud a community college of over $28,000. Represented by both a military and a civilian attorney, respondent entered into a pretrial agreement with the convening authority. In exchange for respondent's plea of guilty, the convening authority agreed to reduce the charges and to refer the case to a special court-martial, which at the time could not impose a sen-

tence of confinement exceeding six months. Pet. App. 3a, 65a.[1]

After conducting an inquiry to determine that respondent's plea was knowing and voluntary, the military judge accepted the plea and convicted respondent of conspiracy and larceny. Respondent was sentenced to three months of confinement, a bad-conduct discharge, and reduction to the lowest enlisted pay grade. Pet. App. 3a-4a. The convening authority approved the sentence, and the N-MCCA affirmed. *Id.* at 64a-67a. Respondent did not seek further review, and he was discharged from the Navy on May 30, 2000. *Id.* at 4a.

In 2006, the Department of Homeland Security initiated removal proceedings against respondent based upon his court-martial conviction. After removal proceedings began, respondent petitioned the N-MCCA for a writ of error coram nobis to review his conviction. He alleged that he had received ineffective assistance of counsel because, he said, his civilian attorney had assured him that pleading guilty would eliminate any risk of deportation. Pet. App. 4a-5a. The N-MCCA (in a summary decision) determined that it had jurisdiction to consider respondent's petition but denied relief on the merits. *Id.* at 62a-63a.

3. The CAAF, by a 3-2 vote, affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1a-60a.

a. The CAAF held that the issuance of a writ of error coram nobis in the military system was authorized by the All Writs Act, 28 U.S.C. 1651(a), which allows

---

[1] If respondent had been convicted by a general court-martial of any of those charges, it appears that he would have been subject to confinement for up to five years for each count. See *Manual for Courts-Martial, United States-1998*, at A12-1 to A12-4.

courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Ibid.*; Pet. App. 7a-21a.

The CAAF first considered whether the requested writ was "in aid of" the N-MCCA's jurisdiction. It determined that because the petition concerned "the validity and integrity of the judgment rendered and affirmed" by the N-MCCA, it was "in aid of" that court's jurisdiction. *Id.* at 8a-9a. The court acknowledged that in *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999), this Court held that the CAAF "is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." Pet. App. 7a (quoting *Goldsmith*, 526 U.S. at 536). But the court believed that *Goldsmith* was inapplicable here, reasoning that whenever a petition seeks "collateral relief to modify an action that was taken within the subject matter jurisdiction of the military justice system, such as the findings or sentence of a court-martial, a writ that is necessary or appropriate may be issued under the All Writs Act 'in aid of' the court's existing jurisdiction." *Id.* at 8a. The court acknowledged that UCMJ Article 76, 10 U.S.C. 876, provides that a court-martial decision after direct review is "final and conclusive," but it interpreted *Councilman*, 420 U.S. at 745, to hold that Article 76 "provides a prudential constraint on collateral review, not a jurisdictional limitation." Pet. App. 9a.

The CAAF next considered whether relief under the All Writs Act was "necessary or appropriate." Pet. App. 11a-21a. It stated that "[a]n Article III court, when asked to consider a court-martial conviction on an issue that has not been fully and fairly reviewed within the military justice system and has not been defaulted pro-

cedurally, is likely to defer action pending review by the court that approved the conviction." *Id.* at 20a. That is because, the court reasoned, "the primary responsibility for addressing challenges to courts-martial resides with the courts in the military justice system established by Congress." *Ibid.* Accordingly, the court concluded that "the Court of Criminal Appeals provides an appropriate forum for coram nobis review." *Ibid.*

Turning to the facts of this case, the CAAF determined that respondent's claim of ineffective assistance of counsel met "the threshold criteria for coram nobis review." Pet. App. 24a. It therefore remanded the case to the N-MCCA to "determine whether the merits of [respondent's] petition can be resolved on the basis of the written submissions, or whether a factfinding hearing is required." *Id.* at 32a.

b. Judge Stucky dissented. Pet. App. 32a-39a. He believed that the court's "authority to grant the requested relief" was "questionable," but he found it unnecessary to reach that issue because, in his view, respondent's claim of ineffective assistance failed on the merits. *Id.* at 35a.

c. Judge Ryan dissented. Pet. App. 40a-60a. She started with the understanding that the CAAF, "as a legislatively created Article I court, is a court of limited jurisdiction" whose "limited powers are defined entirely by statute." *Id.* at 43a. Drawing from this Court's decision in *Goldsmith*, she observed that "the express terms of the [All Writs] Act confine the power of the CAAF to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction." *Id.* at 43a (brackets in original) (quoting *Goldsmith*, 526 U.S. at 534-535).

In Judge Ryan's view, the military courts lacked statutory jurisdiction to consider respondent's petition because respondent is a civilian who no longer has any relationship with the military. Under UCMJ Articles 2 and 3, 10 U.S.C. 802, 803, she explained, "the military justice system does not have jurisdiction over civilians." Pet. App. 44a. Judge Ryan concluded that respondent, as "a *former* servicemember lawfully discharged from military service," has "no legally cognizable relationship with the military justice system." *Id.* at 45a. And, she explained, "[i]t is contrary to the limited nature of a legislatively created Article I court to exercise jurisdiction over a person not specifically prescribed by statute." *Ibid.*

In addition, Judge Ryan reasoned that the UCMJ precludes post-finality collateral review. Pet. App. 46a-48a. Articles 66 and 67, 10 U.S.C. 866, 867, which provide for direct, record-based review of court-martial cases, make "no mention of, and thus no provision for, post-finality collateral review." Pet. App. 48a. To the contrary, she explained, under Article 76, 10 U.S.C. 876, "once appellate review is complete, the findings and sentence are 'final and conclusive'" with "[n]o exception * * * for writs of coram nobis or other collateral review." Pet. App. 50a. Although Article 76 "describe[s] the terminal point for proceedings within the court-martial system," *id.* at 51a (brackets in original) (quoting *Councilman*, 420 U.S. at 750), Judge Ryan observed that it does not deprive Article III courts of authority to review court-martial convictions. *Ibid.* Thus, she concluded, the appropriate forum for any collateral review in a case such as this is an Article III court. *Ibid.*

SUMMARY OF ARGUMENT

The Article I military appellate courts lack jurisdiction to hear a coram nobis challenge, because neither the UCMJ nor the All Writs Act confers such jurisdiction. The All Writs Act requires both that the writ be "in aid of" the court's existing jurisdiction and that it be "necessary or appropriate." 28 U.S.C. 1651(a). Neither condition is satisfied here.

A. In *Clinton* v. *Goldsmith*, 526 U.S. 529, 534-535 (1999), this Court reaffirmed that the All Writs Act is not an independent jurisdictional grant: it confers authority to issue "process 'in aid of' the issuing court's jurisdiction," but it "does not enlarge that jurisdiction." In holding that the military appellate courts had authority to adjudicate respondent's post-finality coram nobis challenge, the CAAF repeated its mistake from *Goldsmith*, where, this Court held, the CAAF had erroneously asserted "continuing jurisdiction" over any judgment that it "at one time had the power to review." *Id.* at 536.

The UCMJ does not vest Article I military courts with open-ended jurisdiction to hear collateral challenges to the merits of final court-martial judgments. Articles 66 and 67 provide a framework only for direct, record-based review of a specified subset of court-martial cases. 10 U.S.C. 866, 867. And Articles 71(c) and 76 prohibit the type of collateral review sought by respondent. Those provisions render the findings and sentence of courts-martial, as affirmed by the military appellate courts and carried into execution, "final and conclusive" and "binding"—subject only to three exceptions, which are inapplicable here. 10 U.S.C. 876. The legislative history confirms that Congress intended Article 73's new-trial procedure (one of the exceptions specified in

Article 76) to supplant the writ of error coram nobis and thereby serve as the exclusive source for post-finality judicial review within the military justice system. The CAAF's contrary decision eviscerates Congress's carefully crafted limits on review of court-martial judgments.

The military courts also lack jurisdiction because respondent is a former service member no longer subject to the UCMJ. In *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14 (1955), this Court rejected on constitutional grounds the extension of Article I court-martial jurisdiction to a former service member "who had severed all relationship with the military." Accordingly, neither the UCMJ nor the military courts govern persons who have been punitively discharged (subject to limited exceptions inapplicable here). 10 U.S.C. 802, 803.

B. Coram nobis review of the merits of a final court-martial conviction also is neither "necessary" nor "appropriate," as required by the All Writs Act. Alternative remedies are available to former service members seeking to challenge a court-martial conviction. The military justice system itself provides several means of review, including pre-finality review by the convening authority and by the courts of criminal appeals and the CAAF as well as post-finality review under Article 73 (new-trial provision). Beyond that, former service members may bring collateral attacks in Article III courts via a habeas petition or a suit for declaratory judgment or mandamus relief, as well as in the Court of Federal Claims via a backpay action under the Tucker Act. See *Goldsmith*, 526 U.S. at 537-539.

The military appellate courts' exercise of coram nobis jurisdiction here is also inappropriate. Coram nobis

permits a court to correct its *own* errors, not those of an inferior court. Because the court-martial dissolves after rendering a conviction, no proper forum in the military justice system exists that can issue the writ. Moreover, the writ is fundamentally incompatible with the carefully designed system of military justice that Congress installed to further good order and discipline in the nation's armed forces. Given the writ's unsettled scope and lack of time limits, it would have the effect of diverting the military justice system's limited resources from its intended role—as demonstrated by the potential need for an evidentiary hearing in this case (under the CAAF's decision) to resolve respondent's claim of ineffective assistance of counsel from a decade ago.

ARGUMENT

THE MILITARY APPELLATE COURTS LACK JURISDICTION TO ADJUDICATE A FORMER SERVICE MEMBER'S CORAM NOBIS CHALLENGE TO THE MERITS OF HIS FINAL COURT-MARTIAL CONVICTION

The question presented is whether an Article I military appellate court has jurisdiction to entertain a petition for a writ of error coram nobis filed by a former service member to review a court-martial conviction that has become final under the UCMJ. Because the UCMJ itself does not provide for any such jurisdiction, the CAAF premised its authority on the All Writs Act, 28 U.S.C. 1651(a), which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a); see Pet. App. 8a. The CAAF's decision contravenes this Court's decision in *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999), key provi-

sions of the UCMJ defining the jurisdiction of military appellate courts, and established principles governing the limited jurisdiction of Article I courts.

A. Coram Nobis Review Of A Final Court-Martial Judgment Is Not "In Aid Of" The Jurisdiction Of A Military Appellate Court

Because the All Writs Act does not itself provide a source of jurisdiction, it cannot support a coram nobis petition in the military courts unless the writ would "aid" an existing basis of jurisdiction. Here, that requirement cannot be met for two independent reasons: first, because the UCMJ provides no basis for such continuing jurisdiction; and, second, because former service not connected to the armed forces are no longer subject to the UCMJ and the military justice system.

1. Goldsmith *makes clear that the All Writs Act does not provide an independent basis of military-court jurisdiction to review court-martial judgments*

In *Goldsmith*, this Court reaffirmed that the All Writs Act is not an independent jurisdictional grant. As the Court explained, the All Writs Act confers authority to issue "process 'in aid of' the issuing court's jurisdiction," but it "does not enlarge that jurisdiction." 526 U.S. at 534-535 (quoting 28 U.S.C. 1651(a)); see, *e.g.*, *Syngenta Crop Prot., Inc.* v. *Henson*, 537 U.S. 28, 33 (2002) ("the All Writs Act does not confer jurisdiction on the federal courts"); see also 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3932, at 470 (2d ed. 1996) ("The All Writs Act * * * is not an independent grant of appellate jurisdiction."); 19 James Wm. Moore et al., *Moore's Federal Practice* § 204.02[4] (3d ed. 2008) (*Moore's Federal Practice*) ("The All Writs Act does not enlarge a court's jurisdiction.").

In *Goldsmith*, a service member was convicted by a general court-martial and sentenced to six years confinement. 526 U.S. at 531. The court of criminal appeals affirmed the conviction and sentence, which became final upon the service member's failure to seek CAAF review. *Id.* at 532. Although the final judgment did not include dismissal from the service, the President later dropped the service member from the rolls of the Air Force through a separate administrative process. *Ibid.* The service member then petitioned the CAAF for extraordinary relief under the All Writs Act, claiming, *inter alia*, that the President's action violated the Constitution. *Id.* at 532-533. The CAAF granted the petition and enjoined the President from dropping him from the service rolls. *Id.* at 533.

This Court reversed. Although the Court acknowledged that military appellate courts are among those empowered to issue extraordinary writs under the All Writs Act, it made clear that the power to do so depended on their existing statutory jurisdiction. See *Goldsmith*, 526 U.S. at 535. The Court reasoned that, because the CAAF no longer possessed jurisdiction under the UCMJ to review the service member's conviction and sentence, it also lacked authority to grant relief under the All Writs Act. *Ibid.* The Court expressly rejected the broad argument that, because the military appellate courts once had jurisdiction over the conviction and sentence, the Act provided a basis for continuing jurisdiction:

> [T]he CAAF is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice or to act as a plenary administrator even of criminal judgments it has affirmed. Simply stated, there is no source of continu-

> ing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review.

Id. at 536. Accordingly, the Court explained, "the CAAF spoke too expansively when it held itself to be 'empowered by the All Writs Act to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis for direct review in [the CAAF] after review in the intermediate court.'" *Id.* at 536-537 (brackets in original) (quoting *Goldsmith* v. *Clinton*, 48 M.J. 84, 87 (C.A.A.F. 1998)).

The CAAF in this case repeated its mistake, holding broadly that "when a petitioner seeks collateral relief to modify an action that was taken within the subject matter jurisdiction of the military justice system, such as the findings or sentence of a court-martial, a writ that is necessary or appropriate may be issued under the All Writs Act 'in aid of' the court's existing jurisdiction." Pet. App. 8a. The Court in *Goldsmith*, however, rejected that very contention, *i.e.*, that the All Writs Act affords the military appellate courts carte blanche jurisdiction to "oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." *Goldsmith*, 526 U.S. at 536. Although this case involves a judgment that was reviewed on direct appeal by the court of criminal appeals and could have been reviewed by the CAAF at that time, "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review." *Ibid.*

This Court's holding in *Goldsmith* is equally applicable in this case. Because the military courts have no existing jurisdiction under the UCMJ to review a collat-

eral challenge to the merits of a final court-martial conviction, the All Writs Act cannot serve as a bootstrap to confer that jurisdiction.

2. Military courts lack jurisdiction under the UCMJ to hear coram nobis challenges to the merits of final court-martial judgments

As with all courts established by Congress under Article I of the Constitution, the jurisdiction of military appellate courts is strictly limited to the bases of jurisdiction expressly conferred upon them by statute. See *Goldsmith*, 526 U.S. at 533-534.[2] Nothing in the statutory charter of either the CAAF or the courts of criminal appeals vests them with open-ended jurisdiction to hear collateral challenges to the merits of final court-martial judgments. Instead, as the legislative history confirms, Congress intended the UCMJ's new-trial procedure to serve as the exclusive source for such review within the military justice system. The CAAF erred in substituting its own expansive notions of jurisdiction for the statutory limits on military-court jurisdiction established by Congress.

---

[2] See also, *e.g.*, *Bowen* v. *Massachusetts*, 487 U.S. 879, 908-909 n.46 (1988) ("The Court of Claims is a court of limited jurisdiction, because its jurisdiction is statutorily granted and it is to be strictly construed.") (quoting *Delaware Div. of Health & Soc. Servs.* v. *United States Dep't of HHS*, 665 F. Supp. 1104, 1117-1118 (D. Del. 1987)); *Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987) ("The Tax Court is a court of limited jurisdiction and lacks general equitable powers."); *In re United Missouri Bank of Kan. City, N.A.*, 901 F.2d 1449, 1451-1452 (8th Cir. 1990) ("Article I courts are courts of special jurisdiction created by Congress that cannot be given the plenary powers of Article III courts. The authority of the Article I court is not only circumscribed by the constitution, but limited as well by the powers given to it by Congress.") (internal citation omitted).

a. The plain text of the UCMJ forecloses post-finality review in military courts

As this Court explained in *Goldsmith*, "the CAAF's independent statutory jurisdiction is narrowly circumscribed." 526 U.S. at 535. Specifically, Article 67 of the UCMJ authorizes the CAAF to "review the record" in certain categories of court-martial judgments reviewed by the intermediate courts of criminal appeals. 10 U.S.C. 867(a). That review is further limited to "matters of law." 10 U.S.C. 867(c). As described by this Court, Congress has "confined the [CAAF's] jurisdiction to the review of specified sentences imposed by courts-martial" and has granted it "the power to act 'only with respect to the findings and sentence as approved by the [court-martial's] convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." *Goldsmith*, 526 U.S. at 534 (second set of brackets in original) (quoting 10 U.S.C. 867(c)).

In turn, Article 66 authorizes the courts of criminal appeals to "review[] court-martial cases" referred to it by the Judge Advocate General and in which the sentence, as approved, includes death, bad-conduct discharge, or confinement for at least one year. 10 U.S.C. 866(a) and (b). That review is confined to the findings and sentence as approved by the convening authority, based on the record from the court-martial. 10 U.S.C. 866(c).

Accordingly, Articles 66 and 67 create a framework for direct, record-based review of court-martial judgments in the military appellate courts. But, as Judge Ryan observed (Pet. App. 46a-47a), nothing in those articles confers jurisdiction upon either the CAAF or the courts of criminal appeals to entertain collateral attacks on the merits of final court-martial judgments (let alone

based on extra-record material). See, *e.g.*, *Witham* v. *United States*, 355 F.3d 501, 505 (6th Cir. 2004) ("[N]either the Uniform Code of Military Justice nor the Manual for Courts-Martial provides for collateral review within the military courts.").

To the contrary, the plain language of UCMJ's finality provisions affirmatively prohibit the type of collateral review sought by respondent. Under Article 71(c), a "judgment as to the legality of the [court martial] proceeding is final * * * when review is completed by a Court of Criminal Appeals" and by the CAAF (if timely sought) and when the time for seeking certiorari has expired. 10 U.S.C. 871(c)(1). Under that "final judgment" rule, appellate review is complete and any discharge may be executed; after final judgment, the UCMJ provides for no further review. Article 76 provides an additional, uniquely military type of finality once military orders have been issued to implement the court-martial judgment:

> The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in

> section 874 of this title (article 74) and the authority of the President.

10 U.S.C. 876.

Finality thus accrues under Article 76 when a military authority executes the punitive discharge—subject only to the three explicitly enumerated exceptions. Of those three exceptions, only Article 73—by way of a petition for a new trial—provides a mechanism for collateral judicial review of court-martial judgments carried into execution. A petition for new trial, however, must be filed with the Judge Advocate General within two years of approval by the convening authority. Moreover, this "special post-conviction remedy," *Burns* v. *Wilson*, 346 U.S. 137, 141 (1953), is vested in the Judge Advocates General, and the military appellate courts play no role in considering an Article 73 petition unless the underlying case is pending before the CAAF or a court of criminal appeals at that time. 10 U.S.C. 873.

The CAAF's assertion of jurisdiction in this case under the aegis of the All Writs Act is tantamount to the addition of a fourth—and potentially much broader—exception to Article 76 finality. That result conflicts with this Court's instruction that "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (quoting *Pennsylvania Bureau of Corr.* v. *United States Marshals Serv.*, 474 U.S. 34, 43 (1985)); cf. *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763, 1767 (2007) ("[A] precisely drawn, detailed statute pre-empts more general remedies.") (quoting *Brown* v. *GSA*, 425 U.S. 820, 834 (1976)). As Judge Ryan observed (Pet. App. 54a), the CAAF's exercise of coram nobis jurisdiction circumvents the statutory scheme established by

Congress, eviscerating Article 76's finality rule as well as Article 73's strict temporal limits. The potential implications of that circumvention are especially stark where, as here, the grant of relief might require a new order by a military appellate court, contravening the long-final military executive order fully executing the court-martial's findings and sentence, to undo an eight-year-old discharge—precisely the type of order that Article 76 precludes on its face.

The CAAF sought to justify its decision to disregard Article 76's limitation on post-finality review by labeling it "prudential." Pet. App. 9a. Specifically, the CAAF relied on *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), for the proposition that Article 76 is merely a "prudential constraint" and not a "jurisdictional limitation." Pet. App. 9a; see Br. in Opp. 8 (noting that "*Councilman* * * * stands for the proposition that Article 76 is a prudential restraint and not a jurisdictional one"). That reliance is misplaced.

In *Councilman,* the Court rejected an argument that Article 76 barred Article III courts from issuing writs of habeas corpus to review court-martial convictions. The Court noted that Article 76 "does not expressly effect any change in the subject-matter jurisdiction of Art. III courts." 420 U.S. at 749. But that observation about the jurisdiction of *Article III* courts has no bearing on the jurisdiction of *military* (*i.e.*, Article I) courts. To the contrary, *Councilman* recognized that "the finality clause" of the predecessor to Article 76 "describ[es] the terminal point for proceedings *within the court-martial system.*" 420 U.S. at 750 (quoting *Gusik* v. *Schilder*, 340 U.S. 128, 132 (1950)) (emphasis added). Indeed, even the CAAF itself previously had recognized as much. See *Loving* v. *United States*, 62 M.J. 235, 240 (C.A.A.F.

2005) ("As finality under Article 76 is the terminal point for proceedings within the court-martial and military justice system, this Court's jurisdiction continues until a case is final."). Because the CAAF and N-MCCA are part of the "court-martial system," Article 76 is not merely a "prudential constraint" (Pet. App. 9a) but "a statutory directive" (*id.* at 51a) that forecloses their continued exercise of jurisdiction.[3]

The CAAF emphasized that *Councilman* cited *United States* v. *Frischholz*, 36 C.M.R. 306 (C.M.A. 1966), a case in which the former Court of Military Appeals—the predecessor of the CAAF—held that it had authority under the All Writs Act to hear a coram nobis petition challenging a final court-martial conviction. Pet. App. 10a. But this Court has never sanctioned the former Court of Military Appeals' decision in *Frischholz*. Instead, *Councilman*—a case about *Article III* jurisdiction—cited *Frischholz* only for the more limited proposition that Article 76 "does not insulate a conviction from subsequent attack in an appropriate forum." 420 U.S. at 753 n.26 (quoting *Frischholz*, 36 C.M.R. at 307). This Court had no occasion to consider *Frischholz*'s broader holding that the Court of Military Appeals was "an appropriate forum" for the issuance of writs of error coram nobis under the circumstances of that case or any other.

[3] Respondent asserts (Br. in Opp. 8) that, if the Court of Federal Claims (an Article I court) can review a court-martial conviction notwithstanding Article 76, it "is difficult to see why" the N-MCCA and the CAAF cannot do so as well. But, as noted above, the finality clause of Article 76 establishes "the terminal point for proceedings *within the court-martial system*." *Gusik*, 340 U.S. at 132 (emphasis added). Unlike the N-MCCA and the CAAF, the Court of Federal Claims is not part of the military justice system. Consequently, Article 76 is not a jurisdictional bar to the Court of Federal Claims' review of court-martial convictions.

That holding, in any event, is suspect for essentially the same reasons as the CAAF's decision below.

b. Longstanding military-law authorities and the UCMJ's legislative history confirm the unavailability of coram nobis review in military courts

The CAAF's expansive exercise of jurisdiction not only contravenes the plain language of the relevant UCMJ provisions but also departs from the positions long adopted by both the Executive and Congress as to the highly circumscribed role of the military courts in affording post-finality relief from a court-martial conviction. The UCMJ, enacted against that backdrop, was designed to foreclose the very type of military-court jurisdiction that the CAAF asserts here.

Dating back to the 1800s, the Attorney General has recognized the final nature of court-martial judgments (at least within the military justice system) once approved by the reviewing authority. See *Relief of Fitz John Porter*, 18 Op. Att'y Gen. 18, 21 (1884) ("[W]here the sentence of a legally constituted court-martial, in a case within its jurisdiction, has been approved by the reviewing authority and carried into execution, it can not afterwards be reviewed and set aside" and "the proceedings are then at an end—the action thus had upon the sentence being, in contemplation of the law, *final*."); *Courts Martial—Lieutenant Devlin*, 6 Op. Att'y Gen. 369, 370 (1854) (holding that a court-martial sentence, "passed upon by the competent authority, from whose decision the law has provided no appeal" cannot "be rescinded, annulled, or modified").

In 1886, Colonel Winthrop similarly explained in his oft-cited treatise:

> [T]he judgment of a court-martial of the United States is, within its scope, absolutely final and conclusive. Its sentence, if *per se* legal, cannot, after it has received necessary official approval, be revoked or set aside; and it is only by the exercise of the pardoning power that it can * * * be rendered in whole or in part inoperative.

William Winthrop, *Military Law and Precedents* 54 (2d ed. 1920) (footnotes omitted) (reprint of 1886 treatise).

The statutory precursors to the UCMJ also reflect the historical narrowness of post-finality review within the military justice system. In 1920, an amendment to the pre-UCMJ Articles of War (which governed the Army) required the Judge Advocate General to establish a board of review to examine the record in any case in which the sentence required Presidential approval; authorized the Judge Advocate General to vacate convictions at the recommendation of the board; and gave the President the ultimate authority to "approve, disapprove, or vacate, in whole or in part, any findings of guilty, or confirm mitigate, commute, remit, or vacate any sentence, in whole or in part." Act of June 4, 1920, ch. 227, Art. 50½, 41 Stat. 797-799. At the same time, the amendment codified the longstanding principle of the finality of a court-martial conviction once it has been approved and ordered into execution: "the President's necessary orders to this end shall be binding upon all departments and officers of the Government." *Ibid.*

In 1948, the Elston Act (Act of June 24, 1948, ch. 625, 62 Stat. 604) further amended the Articles of War to afford members of the Army convicted by a court-martial more robust appellate remedies. See § 226, 62 Stat. 635, 638 (codified as Article of War 50, 10 U.S.C.

1521 (Supp. III 1949)). At the same time, the Act provided that "the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War * * * shall be final and conclusive, and orders publishing the proceedings of courts-martial * * * shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53." § 226, 62 Stat. 637 (codified as Article of War 50(h), 10 U.S.C. 1521(h) (Supp. III 1949)). As the House Report accompanying the legislation explained, that amendment (subject to its limited new-trial exception) made "explicit the finality of sentences of [a] court martial." H.R. Rep. No. 1034, 80th Cong., 1st Sess. 12 (1947).[4] As referenced above, the Elston Act, for the first time, afforded convicted service members a limited source of post-finality relief within the military court system: it authorized the Judge Advocate General to grant petitions for a new trial "upon good cause shown" if filed within a year of final disposition of the case. § 230, 62 Stat. 639 (codified as Article of War 53, 10 U.S.C. 1525 (Supp. III 1949)).

When Congress enacted the UCMJ in 1950, it largely recodified in Article 76 the finality provision it had adopted two years earlier, subject to two additional ex-

---

[4] See 2 *Sundry Legislation Affecting the Naval and Military Establishment: Hearings Before the House Comm. on Armed Services*, 80th Cong., 1st Sess. 2118 (1947) (statement of Brigadier General Hubert D. Hoover) (noting that the amendment codified the "well established" principle governing the finality of a court-martial judgment); see also *Manual for Courts-Martial, United States Army-1949*, at 8 ("Only a Federal court has jurisdiction on writ of habeas corpus to inquire whether a court-martial has jurisdiction of the person and the subject matter or whether it exceeded its powers.").

ceptions based on the authority of the Secretary and the President. Compare 10 U.S.C. 876, with Article of War 53, 10 U.S.C. 1525 (Supp. III 1949). The Senate Report accompanying the legislation explained that "[s]ubject only to a petition for a writ of habeas corpus in Federal court, [Article 76] provides for the finality of court-martial proceedings and judgments." S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949).

Congress also amended the right to petition for a new trial (now codified in Article 73). It permitted such petitions to be filed up to two years (instead of one) after approval of a court-martial sentence, but it confined the bases upon which relief could be granted to "newly discovered evidence or fraud on the court." 10 U.S.C. 873. During Congressional hearings on that amendment, a Department of Defense official explained that its purpose was to restrict such post-finality challenges to "very remote" instances involving extra-record matters that were not susceptible to review in the normal course of appellate review. *Uniform Code of Military Justice: Hearings Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 1211 (1949) (testimony of Felix Larkin, Assistant General Counsel, Department of Defense).

Of particular relevance here, the Defense Department official testified as follows before Congress on the relationship between Article 73's new-trial petition and the civil court remedy of writ of error coram nobis:

> It has been the practice of some civil courts * * *, after the conviction is [af]firmed where habeas corpus will not lie, that the court will permit a so-called writ of error coram nobis, which is an old English writ, which has been revived for just this particular kind of circumstance. *What we did was to combine*

> *what amounts to a writ of error coram nobis with the motion for a new trial on newly discovered evidence. We have provided for both of them and to our minds they are the only additional circumstances over and above the appeal that need a remedy.*

Ibid. (emphasis added). The legislative history thus confirms what is manifest from the text: Congress intended the limited inroad on finality made possible through a motion for a new trial to exhaust the opportunities for collateral challenges within the military system.[5]

In sum, the longstanding structure of military justice provided that, upon finality, a court-martial conviction is not subject to further merits review within the military justice system. The single limited exception to this principle, a new-trial petition under Article 73, was intended to supplant the writ of error coram nobis. The CAAF's decision resurrects that extraordinary remedy—without Congress's well considered limitations as

---

[5] In 1983, Congress enacted the current version of Article 71(c) to clarify that "current law requir[es] completion of the legal review of the case prior to execution of a punitive discharge. This not only will protect the accused, it will also ensure that the government does not *terminate military jurisdiction until a legal review of the case is completed*." *Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 97th Cong., 2d Sess. 32 (1982) (statement of William H. Taft IV, General Counsel of the Department of Defense) (emphasis added). The legislative history's implication is clear: once a punitive discharge is executed such that Article 76 finality attaches, all military-court jurisdiction ceases. To the extent any interstitial military-court jurisdiction exists during the period between Article 71 finality and Article 76 finality (see *Loving*, 62 M.J. at 240-246), Congress left no doubt that it terminates upon accrual of Article 76 finality (subject only to Article 73's express new-trial exception).

to timeliness and subject matter—and thereby asserts a freestanding power to entertain collateral challenges in the military justice system in a manner that Congress never sanctioned. This Court should not permit the CAAF to expand its own authority, in defiance of congressional limits.

c. This case is readily distinguishable from the limited circumstances in which the All Writs Act arguably may be invoked in aid of military-court jurisdiction

This Court suggested (in dicta) in *Noyd* v. *Bond*, 395 U.S. 683 (1969), that the precursor to the CAAF possessed the power to "issue an emergency writ of habeas corpus in cases * * * which may ultimately be reviewed by that court," *i.e.*, in cases like *Noyd* itself (where petitioner sought release via habeas pending direct appellate review of his court-martial conviction). *Id.* at 695 n.7. That limited proposition is fully consistent with the government's construction of the UCMJ and its finality provisions in this case. In cases like *Noyd*—unlike this one—relief under the All Writs Act could be "in aid of" the military court's future appellate jurisdiction. That analysis does not apply here, where the conviction has long since become final. Because this is not a case that "may ultimately be reviewed" by any military court, but rather one involving a post-finality challenge to the court-martial judgment, there is no ongoing or future jurisdiction under Articles 66 or 67 that a writ of error coram nobis could "aid." See *ibid.* ("A different question would, of course, arise in a case which

the Court of Military Appeals is not authorized to review under the governing statutes.").[6]

Likewise, in *Goldsmith*, the government acknowledged that the CAAF could take action to compel adherence to its own judgment in the event of a military authority's attempt to increase the punishment. 526 U.S. at 536. But that limited invocation of the All Writs Act is justified on the basis that courts—Article I and Article III alike—generally possess "inherent power to enforce [their own] judgments. Without jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete.'" *Peacock* v. *Thomas*, 516 U.S. 349, 356 (1996) (quoting *Riggs* v. *Johnson County,* 73 U.S. (6 Wall.) 166, 187 (1868)); see *Axiom Res. Mgmt. Inc.* v. *United States*, 80 Fed. Cl. 530, 539 (2008) (holding that the Court of Federal Claims—an Article I court—"has inherent power to order the parties to the litigation to act in a manner that will enforce its judgment") (quoting *Abbott Labs.* v. *Novopharm Ltd.*, 104 F.3d 1305, 1309 (Fed. Cir. 1997)). A petition *to compel adherence to* a final judgment bears no resemblance to the present petition for writ of error coram nobis seeking to *alter or overturn* that judgment. The former promotes a judgment's finality, while the latter undermines it. As the *Goldsmith* Court recognized, there is a clear distinction between enforcing a judgment, which is permissible, and overturning or otherwise "act[ing] as a plenary administrator * * * of criminal judgments," which is not. 526 U.S. at 536.

---

[6] Although the Court in *Noyd* cited the Court of Military Appeals' decision in *Frischholz* (see p. 21, *supra*) in that same footnote (395 U.S. at 695 n.7), the Court did so only for its rejection of a *categorical* denial of the military courts' power to grant emergency writs—approving of that power only in the circumstance discussed in the text.

Nor does this case concern the availability of collateral review of a conviction for lack of jurisdiction. Even assuming *arguendo* that a military court would possess authority to hear such a challenge,[7] that situation is also readily distinguishable. The military courts' exercise of such authority is designed to ensure that they have not overstepped the jurisdictional boundaries enacted by Congress. Such review thus may further fidelity to the principle of an Article I court's limited jurisdiction, and in that limited respect can be characterized as "in aid of" defining the court's jurisdiction. As discussed, however, in this case there is no basis for concluding that entertaining respondent's coram nobis petition would be "in aid of" a military court's jurisdiction.

3. The military courts also lack jurisdiction over the petition for writ of error coram nobis because respondent is a former service member no longer subject to the UCMJ

The military appellate courts lack jurisdiction over respondent's petition for the independent reason that respondent is "a *former* servicemember lawfully discharged from military service pursuant to a court-martial conviction [who] has no current relationship with the military." Pet. App. 45a. As Judge Ryan observed, the CAAF's contrary decision on this point "flies in the face of Supreme Court precedent, the decisions of at least two federal circuit courts of appeal, and the position, for the past fifty-seven years, of the solicitors general of the United States as agents of the President, commander in

---

[7] Although the CAAF has recognized such authority over the objection of the government in the military appellate courts (see, *e.g.*, *Del Prado* v. *United States*, 48 C.M.R. 748 (C.M.A. 1974)), this Court has not done so and need not reach the issue here.

chief of the armed forces." *Id.* at 40a; see *id.* at 40a-41a (collecting authorities).

The Constitution empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 14. As this Court stated, that clause "authorizes Congress to subject persons actually in the armed service to trial by court-martial for military and naval offenses." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14 (1955) (holding that Congress could not subject a former service member to trial by court-martial even for crimes committed while a serviceman). But "[i]t has never been intimated by this Court * * * that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions." *Ibid.* The Court explained that "[t]o allow this extension of military authority would require an extremely broad construction of the language," whereas "its natural meaning * * * would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." *Id.* at 14-15; see Winthrop, *supra*, at 89 ("It is the *general rule* that the person is amenable to the military jurisdiction only during the period of his service as an officer or soldier," and that jurisdiction "ends with * * * discharge or mustering out."); cf. *Solorio* v. *United States*, 483 U.S. 435, 439 (1987) ("the proper exercise of court-martial jurisdiction over an offense [depends] on one factor: the military status of the accused").

Consistent with that constitutional limitation, the UCMJ does not apply to persons who have been punitively discharged from the armed forces, subject to lim-

ited exceptions inapplicable here.[8] Because the CAAF and the criminal courts of appeals form part of the military justice system, their jurisdiction cannot extend to discharged service members whose convictions are final and who have no remaining connection to the military. Their jurisdiction therefore does not extend to respondent, who, on the day he was discharged from the Navy in 2000, became "a civilian, completely detached from the military and the military justice system." Pet. App. 45a (Ryan, J., dissenting). Indeed, the CAAF's contrary assertion trenches upon the President's authority as commander-in-chief (U.S. Const. Art. II, § 2)—as well as Congress's delegated authority in Articles 71 and 76 (see pp. 18-20, *supra*)—by disregarding executive military orders that terminated respondent's relationship with the armed forces and their courts.

Respondent claims (Br. in Opp. 12-13) that the government's argument here "conflates personal jurisdiction and appellate subject matter jurisdiction" and that, if correct, it would mean that Article III courts and the Court of Federal Claims (in a backpay action) would lack jurisdiction to adjudicate claims arising from court-mar-

---

[8] The exceptions cover persons who are in custody of the armed forces serving a sentence imposed by a court-martial, see 10 U.S.C. 802(a)(7), and, in certain cases, deserters and persons who procured their discharge by fraud, see 10 U.S.C. 803(b) and (c). The CAAF also has held that discharge from the armed forces during the pendency of a direct appeal does not divest it of jurisdiction, based upon the principle that "once court-martial jurisdiction attaches, it continues until the appellate processes are completed." *United States* v. *Woods*, 26 M.J. 372, 373 (C.M.A. 1988) (internal quotation marks omitted); see, *e.g.*, *United States* v. *Davis*, 63 M.J. 171, 176 (C.A.A.F. 2006). Because the appellate process in this case was completed years ago, that principle provides no basis for the military appellate courts' assertion of jurisdiction here.

tial convictions. But this Court's decision in *Toth* is not predicated solely on notions of personal jurisdiction; instead, it speaks more broadly to the constitutionally permissible scope of military-court jurisdiction over cases involving non-service members. And, unlike that of the military appellate courts, the subject-matter jurisdiction of Article III courts and the Court of Federal Claims is not confined to cases involving persons subject to the UCMJ. Rather, they possess jurisdiction to entertain the claims of anyone, including former members of the armed forces, as long as such claims otherwise fall within their statutory and constitutional authority.

B. Coram Nobis Review Of The Merits Of A Final Court-Martial Judgment Is Neither Necessary Nor Appropriate

Even if a military appellate court had some jurisdictional basis for collaterally reviewing the merits of a final court-martial judgment, the court would still lack authority under the All Writs Act to issue the writ of error coram nobis in this case because it is neither "necessary" nor "appropriate." 28 U.S.C. 1651(a). As this Court has observed, "it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate." *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (brackets in original) (quoting *United States* v. *Smith*, 331 U.S. 469, 476 n.4 (1947)). That observation applies with even greater force in the military context. First, the availability of alternative remedies for former service members seeking to challenge their court-martial convictions makes coram nobis unnecessary. Second, a military appellate court's review of a court-martial judgment long after the conviction has become final is inappropriate because it is inconsistent with the traditional

scope of the writ and incompatible with the demands of our system of military justice.

1. Adequate alternative remedies are available to convicted former service members

Even when jurisdiction may otherwise exist, the All Writs Act, this Court has held, "invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." *Goldsmith*, 526 U.S. at 537; see 19 *Moore's Federal Practice* § 201.40 ("[A] writ may not be used * * * when another method of review will suffice."). That limitation applies here because, even without resort to coram nobis, a former service member has several avenues for challenging a court-martial conviction, including an Article III habeas petition.

As discussed above, the military justice system itself provides multiple means for review of a court-martial conviction. See *Goldsmith*, 526 U.S. at 537 n.11. Aside from plenary review by the convening authority and direct appellate review in the courts of criminal appeals and the CAAF (see pp. 3-4, *supra*), a convicted person can seek additional pre-finality review in certain circumstances (see p. 27, *supra*) and can petition post-finality for a new trial under Article 73 (see p. 19, *supra*). Even if they are outside the two-year window, a convicted service member may petition the military courts in certain circumstances, *i.e.*, to compel adherence to the final judgment or to challenge the court-martial's jurisdiction. See p. 28, *supra*.

Outside the military justice system, the most common avenue for collateral attack is habeas corpus review in an Article III court under 28 U.S.C. 2241. As the Court noted in *Goldsmith*, "once a criminal conviction

has been finally reviewed within the military system, and a servicemember in custody has exhausted other avenues provided under the UCMJ to seek relief from his conviction, * * * he is entitled to bring a habeas corpus petition" in federal court. 526 U.S. at 537 n.11 (citation omitted); see *Councilman*, 420 U.S. at 750; *Gusik*, 340 U.S. at 132-133.

Even in cases where the former service member is no longer in custody, there are sufficient alternative remedies to foreclose recourse to coram nobis relief. For example, federal courts have entertained collateral challenges to court-martial convictions under their general federal-question jurisdiction and under their authority to grant declaratory judgments or mandamus relief. See, *e.g.*, *United States ex rel. New* v. *Rumsfeld*, 448 F.3d 403, 406-407 (D.C. Cir. 2006) (finding federal-question jurisdiction under 28 U.S.C. 1331), cert. denied, 127 S. Ct. 2096 (2007); *Davis* v. *Marsh*, 876 F.2d 1446, 1448 & n.4 (9th Cir. 1989) (reviewing declaratory judgment action to void court-martial conviction); *Baker* v. *Schlesinger*, 523 F.2d 1031, 1034-1035 (6th Cir. 1975) (finding jurisdiction under 28 U.S.C. 1361 for mandamus action), cert. denied, 424 U.S. 972 (1976).

The CAAF justified its assertion of coram nobis jurisdiction on the theory that, even after a court-martial conviction has become final, Article III courts will abstain from adjudicating claims for collateral review pending exhaustion of available remedies within the military justice system. Pet. App. 16a-17a. But as Judge Ryan explained (*id.* at 58a-59a), an exhaustion rule cannot invest the military courts with collateral jurisdiction that they otherwise would lack. If the military appellate courts have no continuing jurisdiction in a case that is final under Article 76, then the lack of post-finality re-

view in those courts would not impede review by an Article III court (because there are no further military-court remedies to exhaust).

In addition, former service members who allege that their discharge was unlawful may collaterally challenge their court-martial convictions in an action for backpay in the Court of Federal Claims. See 28 U.S.C. 1491(a); *Goldsmith*, 526 U.S. at 539 (collecting cases); see also, *e.g.*, *Matias* v. *United States*, 923 F.2d 821, 823 (Fed. Cir. 1990) ("We have long honored the rule that 'judgments by courts-martial, although not subject to direct review by federal civil courts, may nevertheless be subject to narrow collateral attack [in the Court of Federal Claims] on constitutional grounds' when traditional Tucker Act jurisdiction is present.") (quoting *Bowling* v. *United States*, 713 F.2d 1558, 1560 (Fed. Cir. 1983)).

Respondent argues (Br. in Opp. 10) that the statutes of limitations that govern those alternative claims would preclude him from seeking relief now. But even if that were so, particular factual circumstances in any given case are not a basis for the CAAF to expand its jurisdiction to classes of cases that have become final and that, as a general rule, are subject to adequate alternative remedies. It is enough that respondent's "constitutional objections *could* have been addressed by the federal courts." *Goldsmith*, 526 U.S. at 539 n.12 (emphasis added); cf., *e.g.*, *Trenkler* v. *United States*, 536 F.3d 85, 99 (1st Cir. 2008) ("adequacy and effectiveness [of the remedy] must be judged ex ante" in determining whether Section 2255's savings clause applies), petition for cert. pending, No. 08-7947 (filed Dec. 22, 2008).

2. Coram nobis jurisdiction is also inappropriate in light of the writ's traditional scope as well as the burdens imposed on the military justice system

The military appellate courts' exercise of coram nobis jurisdiction here is also inappropriate.

a. The writ of error coram nobis permits a court to correct its *own* errors, not to correct those of an inferior court. As the Second Circuit has explained, "[t]he term '*coram nobis*' * * * comes from the phrase 'error *quae coram nobis resident*,' which means, literally, an error 'which remains in our presence.'" *Finkelstein* v. *Spitzer*, 455 F.3d 131, 133 (2006) (citations omitted), cert. denied, 549 U.S. 1169 (2007). The common-law writ thus "was used by a court in cases within its own jurisdiction, not to correct errors in other jurisdictions." *Ibid.*; see, *e.g.*, *United States* v. *Morgan*, 346 U.S. 502, 507 n.9 (1954) ("[I]f there be error in the *process*, or through the default of the *clerks*, it may be reversed in the same court, by writ of error *coram nobis*.") (quoting 2 William Tidd, *Practice of the Courts of King's Bench and Common Pleas* 1136 (4th Am. ed. 1856)); *Lowery* v. *McCaughtry*, 954 F.2d 422, 423 (7th Cir.) ("Coram nobis is an established writ, but the 'usages and principles of law' send an applicant to the court that issued the judgment.") (citations omitted), cert. denied, 506 U.S. 834 (1992); *Booker* v. *Arkansas*, 380 F.2d 240, 244 (8th Cir. 1967) ("Relief by the writ * * * is available, if at all, only in the court which rendered the judgment."); 19 *Moore's Federal Practice* § 204.05[5] (3d ed. 2008) ("The district courts have the power to issue writs of coram nobis to correct errors within their own jurisdiction under the All Writs Act.").

Neither the CAAF nor the N-MCCA was the court that rendered the judgment in this case: the judgment

was entered by a court-martial. Courts-martial are not standing bodies like Article III courts, but are convened to hear particular cases and then are dissolved. See pp. 3-4, *supra*; *Runkle* v. *United States*, 122 U.S. 543, 555-556 (1887) ("A court-martial * * * is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved."). Because courts-martial are "ad hoc proceedings which dissolve after the purpose for which they were convened has been resolved," they are incapable of considering petitions for collateral relief. *Witham*, 355 F.3d at 505; see *United States* v. *DuBay*, 37 C.M.R. 411, 413 n.2 (C.M.A. 1967); Pet. App. 53a n.8 ("Because we do not having standing [trial] courts, the military justice system appears ill-suited to [coram nobis] relief.").

The CAAF in this case acknowledged both indisputable points: that the writ of error coram nobis is available only from the court that rendered the judgment *and* that the trial court is not available. Pet. App. 17a-19a. It follows that no military court possesses the power to issue the writ. The CAAF's contrary conclusion (citing only the *direct* review provision of Article 66(c), *id.* at 19a) is fundamentally inconsistent with the common-law scope of the writ and therefore cannot give rise to an "appropriate" exercise of the authority granted by the All Writs Act.[9]

---

[9] Respondent maintains (Br. in Opp. 10-11) that "the worst that can be said [concerning his motion for coram nobis relief] is that his petition should * * * have been labeled a petition for a writ of error coram *vobis*" and that the government's assertion that the CAAF was without jurisdiction to grant coram nobis relief therefore "exalt[s] nomenclature over substance" (internal quotation marks omitted). But such a writ would have been equally inappropriate here. A writ of error coram

b. The writ of error coram nobis is also fundamentally incompatible with a military justice system that emphasizes finality in order to instill discipline critical to the maintenance of a well-trained armed force without detracting from the military's primary mission. See 10 U.S.C. 871(c)(1), 876; *Toth*, 350 U.S. at 17 ("[T]rial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.").

While courts have adopted certain common-law limits on the scope of the writ, the availability of coram nobis relief remains subject to unsettled and amorphous legal standards. As this Court has recognized, petitions for extraordinary relief such as a writ of error coram nobis generally are not subject to time limits. See *In re Sindram*, 498 U.S. 177, 180 (1991); Pet. App. 54a (Ryan, J., dissenting). In crafting the bounds of the petition for new trial within the military justice system, the proponents of Article 73 intended that remedy to serve as a substitute for coram nobis relief. See pp. 25-26, *supra*. In particular, Congress imposed a two-year time limit on the submission of such petitions to vindicate the strong interest in finality. 10 U.S.C. 873. The CAAF's decision, which permits petitions for coram nobis relief at any time, frustrates that important legislative objective.

---

vobis is "directed by a reviewing court to the court which tried the cause." *Nicks* v. *United States*, 955 F.2d 161, 166 (2d Cir. 1992). In this case, the reason why the CAAF could not grant a writ of error coram vobis is identical to the reason why it could not entertain a writ of error coram nobis. Because courts-martial are not standing tribunals, and respondent's special court-martial was long ago dissolved, there is no tribunal to which such a writ could have been directed.

Additionally, the CAAF's decision has the practical effect of diverting the limited resources of the military justice system from its intended role of administering justice, fostering discipline, and maintaining readiness within the armed forces to that of factfinding on behalf of individuals who have long severed their ties with the military. The resolution of collateral challenges to court-martial convictions often may require evidentiary hearings. Resolution of respondent's ineffective assistance claim, for example, would necessitate factual findings concerning what advice respondent's civilian attorney provided him and whether respondent's decision to enter pleas of guilty were predicated upon such advice. Pet. App. 31a-32a. No provision of the UCMJ, however, prescribes procedures for litigating such factual issues long after convictions have become final and the court-martial has been dissolved. As a result, the CAAF has improvised "an unwieldy and imperfect system" for post-conviction factfinding by the assignment of the case to a court-martial convening authority with instructions to hold an evidentiary hearing. *Id.* at 47a (Ryan, J. dissenting) (citing *DuBay*, 37 C.M.R. at 413). That procedure requires a senior commander, members of his staff, a military judge, trial counsel, and military defense counsel—none of whom will have had prior involvement in the case—to divert their attention from their primary responsibilities to the resolution of factual issues that may involve events occurring years before.

Even in cases where post-conviction claims can be addressed without resorting to an evidentiary hearing, the government likely would be required not only to appoint counsel to represent its interests but also to appoint defense counsel at its expense to represent a now-civilian petitioner. See 10 U.S.C. 870(c)(2). As this

Court has noted, when petitioners "are not subject to the financial considerations," such as attorney's fees, "that deter other litigants from filing frivolous petitions," they have "a greater capacity than most to disrupt the fair allocation of judicial resources." *In re Sindram*, 498 U.S. at 180. And "[t]he risks of abuse are particularly acute with respect to applications for extraordinary relief, since such petitions are not subject to any time limitations and, theoretically, could be filed at any time without limitation." *Ibid*. For all of those reasons, the open-ended post-conviction remedy that the CAAF adopted in this case is singularly inappropriate in the military context.

CONCLUSION

The judgment of the CAAF should be reversed.

Respectfully submitted.

DANIEL J. DELL'ORTO
Principal Deputy General Counsel
Department of Defense

LOUIS J. PULEO
Col., USMC
Director

BRIAN K. KELLER
Deputy Director

TIMOTHY H. DELGADO
Lt., JAGC, USN
Appellate Government Division
Department of the Navy

GREGORY G. GARRE
Solicitor General

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

PRATIK A. SHAH
Assistant to the Solicitor General

JOHN F. DE PUE
Attorney

JANUARY 2009

APPENDIX

1. 10 U.S.C. 802 provides:

Art. 2. Persons subject to this chapter

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(13) Lawful enemy combatants (as that term is defined in section 948a(2) of this title) who violate the law of war.

(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

(c) Notwithstanding any other provision of law, a person serving with an armed force who—

(1) submitted voluntarily to military authority;

(2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) received military pay or allowances; and

(4) performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

(d)(1) A member of a reserve component who is not on active duty and who is made the subject of proceedings under section 815 (article 15) or section 830 (article 30) with respect to an offense against this chapter may be ordered to active duty involuntarily for the purpose of—

(A) investigation under section 832 of this title (article 32);

(B) trial by court-martial; or

(C) nonjudicial punishment under section 815 of this title (article 15).

(2) A member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was—

(A) on active duty; or

(B) on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(3) Authority to order a member to active duty under paragraph (1) shall be exercised under regulations prescribed by the President.

(4) A member may be ordered to active duty under paragraph (1) only by a person empowered to convene general courts-martial in a regular component of the armed forces.

(5) A member ordered to active duty under paragraph (1), unless the order to active duty was approved by the Secretary concerned, may not—

(A) be sentenced to confinement; or

(B) be required to serve a punishment consisting of any restriction on liberty during a period other than a period of inactive-duty training or active duty (other than active duty ordered under paragraph (1)).

(e) The provisions of this section are subject to section 876b(d)(2) of this title (article 76b(d)(2)).

2. 10 U.S.C. 803 provides:

Art. 3. Jurisdiction to try certain personnel

(a) Subject to section 843 of this title (article 43), a person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.

(b) Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is, subject to section 843 of this title (article 43), subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

(c) No person who has deserted from the armed forces may be relieved from amenability to the jurisdiction of this chapter by virtue of a separation from any later period of service.

(d) A member of a reserve component who is subject to this chapter is not, by virtue of the termination of a period of active duty or inactive-duty training, relieved from amenability to the jurisdiction of this chapter for an offense against this chapter committed during such period of active duty or inactive-duty training.

3. 10 U.S.C. 866 provides:

Art. 66. Review by Court of Criminal Appeals

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

4. 10 U.S.C. 867 provides:

Art. 67. Review by the Court of Appeals for the Armed Forces

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed

Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

5. 10 U.S.C. 871 provides:

Art. 71. Execution of sentence; suspension of sentence

(a) If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit. That part of the sentence providing for death may not be suspended.

(b) If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary, or Assistant Secretary, as the case may be, may commute, remit, or suspend the sentence, or any part of the sentence, as he sees fit. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

(c)(1) If a sentence extends to death, dismissal, or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn, under section 861 of this title (article 61), that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death or dismissal, approval under subsection (a) or (b), as appropriate). A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Criminal Appeals and—

(A) the time for the accused to file a petition for review by the Court of Appeals for the Armed Forces has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;

(B) such a petition is rejected by the Court of Appeals for the Armed Forces; or

(C) review is completed in accordance with the judgment of the Court of Appeals for the Armed Forces and—

(i) a petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;

(ii) such a petition is rejected by the Supreme Court; or

(iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

(2) If a sentence extends to dismissal or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is waived, or an appeal is withdrawn, under section 861 of this title (article 61), that part of the sentence extending to dismissal or a bad-conduct or dishonorable discharge may not be executed until review of the case by a judge advocate (and any action on that review) under section 864 of this title (article 64) is completed. Any other part of a court-martial sentence may be ordered executed by the convening authority or other person acting on the case under section 860 of this title (article 60) when approved by him under that section.

(d) The convening authority or other person acting on the case under section 860 of this title (article 60) may suspend the execution of any sentence or part thereof, except a death sentence.

6. 10 U.S.C. 873 provides:

Art. 73. Petition for a new trial

At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before a Court of Criminal Appeals or before the Court of Appeals for the Armed Forces, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition.

7. 10 U.S.C. 876 provides:

Art. 76. Finality of proceedings, findings, and sentences

The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74) and the authority of the President.

8. 28 U.S.C. 1651 provides:

Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.